

ORDINANCE NO. 3698
ORDINANCE OF THE MARIN COUNTY BOARD OF SUPERVISORS
ADDING CHAPTER 5.75 OF THE MARIN COUNTY CODE PROHIBITING THE SALE
OR OFFER FOR SALE OF FLAVORED TOBACCO PRODUCTS AND AMENDING
ALL EXISTING MARIN COUNTY CODE SECTIONS THAT DEFINE "TOBACCO PRODUCT"

THE BOARD OF SUPERVISORS OF THE COUNTY OF MARIN does hereby ordain as follows:

SECTION I: Chapter 5.75 of the Marin Code is hereby added to read as follows:

Chapter 5.75

PROHIBITION AGAINST THE SALE OR OFFER FOR SALE OF FLAVORED TOBACCO
PRODUCTS

Sections:

- 5.75.010 Applicability
- 5.75.020 Findings
- 5.75.030 Definitions
- 5.75.040 Prohibition Against Sale or Offer for Sale of Flavored Tobacco Products
- 5.75.050 Penalties and Enforcement
- 5.75.060 Public Nuisance
- 5.75.070 No Conflict with Federal or State Law
- 5.75.080 Severability

5.75.010 Applicability.

The provisions of this Chapter shall apply within the unincorporated areas of Marin County.

5.75.020 Findings.

The Board of Supervisors hereby finds and declares as follows:

- a) Tobacco use remains the leading cause of preventable death in the United States, killing more than 480,000 people each year.¹ It causes or contributes to many forms of cancer, as well as heart and respiratory diseases, among other health disorders.² Tobacco use remains a public health crisis of the first order, in terms of the human suffering and loss of life it causes, the financial costs it imposes on society and the burdens it places on our health care system. The cost to Marin residents, including nonsmokers, is \$551 per person annually. The cost of smoking is \$4,814 per Marin smoker. The total cost of smoking to residents of Marin is \$138,354,000 annually.³
- b) Flavored tobacco products are commonly sold by California tobacco retailers. For example, 97.4% of stores that sell cigarettes sell menthol cigarettes; 94.5% of stores that sell little cigars sell them in flavored varieties; 84.2% of stores that sell electronic smoking devices sell flavored varieties; and 83.8% of stores that sell chew or snus sell flavored varieties.

¹ U.S. Department of Health and Human Services. *The Health Consequences of Smoking — 50 Years of Progress A Report of the Surgeon General Executive Summary*.; 2014. Available at: www.surgeongeneral.gov/library/reports/50-years-of-progress/exec-summary.pdf.

² The tobacco health toll. Cairo, WHO Regional Office for the Eastern Mediterranean, 2005.

³ Max W, Sung H-Y, Shi Y, & Stark B. The Cost of Smoking in California, 2009. San Francisco, CA: Institute for Health & Aging, University of California, San Francisco, 2014.

- c) Each day, about 2,500 children in the United States try their first cigarette; and another 400 children under 18 years of age become new regular, daily smokers.⁴ 81% of youth who have ever used a tobacco product report that the first tobacco product they used was flavored.⁵ Flavored tobacco products promote youth initiation of tobacco use and help young occasional smokers to become daily smokers by reducing or masking the natural harshness and taste of tobacco smoke and thereby increasing the appeal of tobacco products.⁶ As tobacco companies well know, menthol, in particular, cools and numbs the throat to reduce throat irritation and make the smoke feel smoother, making menthol cigarettes an appealing option for youth who are initiating tobacco use.⁷ Tobacco companies have used flavorings such as mint and wintergreen in smokeless tobacco products as part of a "graduation strategy" to encourage new users to start with tobacco products with lower levels of nicotine and progress to products with higher levels of nicotine.⁸ It is therefore unsurprising that young people are much more likely to use menthol-, candy- and fruit-flavored tobacco products than adults, including not just cigarettes but also cigars, cigarillos, and hookah tobacco.⁹ Data from the National Youth Tobacco Survey indicate that more than two-fifths of U.S. middle school and high school

⁴ Substance Abuse and Mental Health Services Administration (SAMHSA), HHS, Results from the 2016 National Survey on Drug Use and Health, NSDUH: Detailed Tables, 2017. <https://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs-2016/NSDUH-DetTabs-2016.pdf>.

⁵ Ambrose, BK, et al., "Flavored Tobacco Product Use Among US Youth Aged 12-17 Years, 2013-2014," *Journal of the American Medical Association*, published online October 26, 2015.

⁶ Carpenter CM, Wayne GF, Pauly JL, Koh HK, Connolly GN. New cigarette brands with flavors that appeal to youth: Tobacco marketing strategies. Tobacco industry documents reveal a deliberate strategy to add flavors known to appeal to younger people. *Health Aff.* 2005;24(6):1601-1610. doi:10.1377/hlthaff.24.6.1601. Lewis MJ, Wackowski O. Dealing with an innovative industry: A look at flavored cigarettes promoted by mainstream brands. *Am J Public Health.* 2006;96(2):244-251. doi:10.2105/AJPH.2004.061200. Connolly GN. Sweet and spicy flavours: new brands for minorities and youth. *Tob Control.* 2004;13(3):211-212. doi:10.1136/tc.2004.009191. U.S. Department of Health and Human Services Office of Disease Prevention and Health Promotion. *Preventing Tobacco Use Among Youth and Young Adults A Report of the Surgeon General.* 2012. www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/. King BA, Dube SR, Tynan MA. Flavored cigar smoking among U.S. adults: Findings from the 2009-2010 national adult tobacco survey. *Nicotine Tob Res.* 2013;15(2):608-614. doi:10.1093/ntr/nts178. Nelson DE, Mowery P, Tomar S, Marcus S, Giovino G, Zhao L. Trends in smokeless tobacco use among adults and adolescents in the United States. *Am J Public Health.* 2006;96(5):897-905. doi:10.2105/AJPH.2004.061580. Food and Drug Administration. *Preliminary Scientific Evaluation of the Possible Public Health Effects of Menthol Versus Nonmenthol Cigarettes.* 2013. www.fda.gov/downloads/ScienceResearch/SpecialTopics/PeerReviewofScientificInformationandAssessments/UCM361598.pdf.

⁷ FDA, Preliminary Scientific Evaluation of the Possible Public Health Effects of Menthol versus Nonmenthol Cigarettes, 2013

⁸ Hersey JC, Ng SW, Nonnemaker JM, et al. Are menthol cigarettes a starter product for youth? *Nicotine Tob Res.* 2006;8(3):403-413. doi:10.1080/14622200600670389. Wackowski O, Delnevo CD. Menthol cigarettes and indicators of tobacco dependence among adolescents. *Addict Behav.* 2007;32(9):1964-1969. doi:10.1016/j.addbeh.2006.12.023. U.S. Department of Health and Human Services Office of Disease Prevention and Health Promotion. *Preventing Tobacco Use Among Youth and Young Adults A Report of the Surgeon General.* 2012. www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/.

⁹ U.S. Department of Health and Human Services Office of Disease Prevention and Health Promotion. *Preventing Tobacco Use Among Youth and Young Adults A Report of the Surgeon General.* 2012. www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/. King BA, Dube SR, Tynan MA. Flavored cigar smoking among U.S. adults: Findings from the 2009-2010 national adult tobacco survey. *Nicotine Tob Res.* 2013;15(2):608-614. doi:10.1093/ntr/nts178. Villanti AC, Richardson A, Vallone DM, Rath JM. Flavored tobacco product use among U.S. young adults. *Am J Prev Med.* 2013;44(4):388-391. doi:10.1016/j.amepre.2012.11.031. Substance Abuse and Mental Health Services Administration. *The NSDUH Report: Recent Trends in Menthol Cigarette Use.* Rockville, MD; 2011. www.samhsa.gov/data/sites/default/files/WEB_SR_088/WEB_SR_088/WEB_SR_088.htm.

smokers report using flavored little cigars or flavored cigarettes.¹⁰ The U.S. Centers for Disease Control and Prevention has reported a more than 800% increase in electronic cigarette use among middle school and high school students between 2011 and 2015.¹¹ Nicotine solutions, which are consumed via electronic smoking devices such as electronic cigarettes are sold in thousands of flavors that appeal to youth, such as cotton candy and bubble gum.¹²

- d) Certain minority groups also disproportionately use flavored tobacco products, including menthol cigarettes. In one survey, the percentage of people who smoke cigarettes that reported smoking menthol cigarettes in the prior month included, most dramatically, 82.6% of Blacks or African-Americans who smoke cigarettes.¹³ The statistics for other groups were: 53.2% of Native Hawaiians or Other Pacific Islanders who smoke cigarettes; 36.9% of individuals with multiracial backgrounds who smoke cigarettes; 32.3% of Hispanics or Latinos who smoke cigarettes; 31.2% of Asians who smoke cigarettes; 24.8% of American Indians or Alaska Natives who smoke cigarettes; and 23.8% of Whites or Caucasians who smoke cigarettes.¹⁴ People who identify as LGBT and young adults with mental health conditions also struggle with disproportionately high rates of menthol cigarette use.¹⁵ The disproportionate use of menthol cigarettes among targeted groups, especially the extremely high use among African-Americans, is troubling because of the long-term adverse health impacts on those populations.
- e) Between 2004 and 2014 overall smoking prevalence decreased, but use of menthol cigarettes increased among both young adults (ages 18-25) and other adults (ages 26+).¹⁶ These statistics are consistent with the finding that smoking menthol cigarettes reduces the likelihood of successfully quitting smoking.¹⁷ Scientific

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- ¹⁰ King BA, Tynan MA, Dube SR, Arrazola R. Flavored-little-cigar and flavored-cigarette use among U.S. middle and high school students. *J Adolesc Heal.* 2014;54(1):40-46. doi:10.1016/j.jadohealth.2013.07.033.
 - ¹¹ Singh T, Arrazola RA, Corey CG, et al. Tobacco Use Among Middle and High School Students — United States, 2011–2015. *MMWR Morb Mortal Wkly Rep.* 2016;65(14):361-367. doi:10.15585/mmwr.mm6514a1.
 - ¹² Cameron JM, Howell DN, White JR, Andrenyak DM, Layton ME, Roll JM. Variable and potentially fatal amounts of nicotine in e-cigarette nicotine solutions. *Tob Control.* 2014;23(1):77-78. doi:10.1136/tobaccocontrol-2012-050604. U.S. Department of Health and Human Services Office of Disease Prevention and Health Promotion. *Preventing Tobacco Use Among Youth and Young Adults A Report of the Surgeon General.* 2012. www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/.
 - ¹³ Substance Abuse and Mental Health Services Administration. *The NSDUH Report: Use of Menthol Cigarettes.* 2009. <https://perma.cc/4UG9-HUQ2>.
 - ¹⁴ *Id.*
 - ¹⁵ Fallin A, Goodin AJ, King BA. Menthol cigarette smoking among lesbian, gay, bisexual, and transgender adults. *Am J Prev Med;* Cohn AM, Johnson AL, Hair E, Rath JM, Villanti AC. Menthol tobacco use is correlated with mental health symptoms in a national sample of young adults: implications for future health risks and policy recommendations. *Tob Induc Dis.* 2016;14(1):1. doi:10.1186/s12971-015-0066-3.2015;48(1):93-97. doi:10.1016/j.amepre.2014.07.044.
 - ¹⁶ Villanti AC, Mowery PD, Delnevo CD, Niaura RS, Abrams DB, Giovino DB. Changes in the prevalence and correlates of menthol cigarette use in the USA, 2004-2014. *Tob Control.* 2016;25:ii14-ii20. doi: 10.1136/tobaccocontrol-2016-053329.
 - ¹⁷ Tobacco Products Scientific Advisory Committee. *Menthol Cigarettes and Public Health: Review of the Scientific Evidence and Recommendations.* 2011. www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM269697.pdf. Food and Drug Administration. *Preliminary Scientific Evaluation of the Possible Public Health Effects of Menthol Versus Nonmenthol Cigarettes.* 2013. www.fda.gov/downloads/ScienceResearch/SpecialTopics/PeerReviewofScientificInformationandAssessments/UCM3615

modeling has projected that a national ban on menthol cigarettes could save between 300,000 and 600,000 lives by 2050.¹⁸

- f) Pipe tobacco use compared with never use of tobacco, is associated with an increased risk of death from cancers of the lung, oropharynx, larynx, pancreas and bladder.¹⁹
- g) According to the latest California Healthy Kids Survey the Electronic Cigarette Use Prevalence and Patterns has increased significantly from 2015-16 to 2017-18. Percent of Marin students who currently use electronic cigarettes or other vaping device in past 30 days rose from 9% to 20% for 9th graders and from 11% to 28% for 11th graders. Therefore, almost a third of the Marin 11th graders are current users of these harmful nicotine products that significantly increase their risk of life long addiction and increase risk of becoming cigarette smokers.²⁰

5.75.030 Definitions.

For the purposes of this chapter, the following definitions shall govern unless the context clearly requires otherwise:

- (a) "Characterizing Flavor" means a distinguishable taste or aroma or both, other than the taste or aroma of tobacco, imparted by a Tobacco Product or any byproduct produced by the Tobacco Product. Characterizing Flavors include, but are not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice. A Tobacco Product shall not be determined to have a Characterizing Flavor solely because of the use of additives or flavorings or the provision of ingredient information. Rather, it is the presence of a distinguishable taste or aroma, or both, as described in the first sentence of this definition that constitutes a Characterizing Flavor.
- (b) "Constituent" means any ingredient, substance, chemical, or compound, other than tobacco, water, or reconstituted tobacco sheet that is added by the manufacturer to a Tobacco Product during the processing, manufacture, or packing of the Tobacco Product.
- (c) "Distinguishable" means perceivable by either the sense of smell or taste.
- (d) "Flavored Tobacco Product" means any Tobacco Product that contains a Constituent that imparts a Characterizing Flavor.
- (e) "Labeling" means written, printed, pictorial, or graphic matter upon any Tobacco Product or any of its Packaging.

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¹⁸ Levy DT, Pearson JL, Villanti AC, et al. Modeling the future effects of a menthol ban on smoking prevalence and smoking-attributable deaths in the United States. *Am J Public Health*. 2011;101(7):1236-1240. doi:10.2105/AJPH.2011.300179.

¹⁹ Inoue-Choi M, Liao LM, Reyes-Guzman C, Hartge P, Caporaso N, Freedman ND. Association of Long-term, Low-Intensity Smoking with All-Cause and Cause-Specific Mortality in the National Institutes of Health–AARP Diet and Health Study. *JAMA Intern Med*. 2017;177(1):87–95. doi:10.1001/jamainternmed.2016.7511

²⁰ WestEd report under contract from the California Department of Health Care Services, supported by the California Department of Education and Coordinated School Health and Safety Office.

- (f) "Packaging" means a pack, box, carton, or container of any kind or, if no other container, any wrapping (including cellophane) in which a Tobacco Product is sold, or offered for sale, to a consumer.
- (g) "Tobacco Product" means: (1) Any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to, cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, and snuff.

(2) Any electronic device that delivers nicotine or other substances to the person inhaling from the device, including, but not limited to, an electronic cigarette, electronic cigar, electronic pipe, or electronic hookah.

(3) Notwithstanding any provision of subsections (1) and (2) to the contrary, "Tobacco Product" includes any component, part, or accessory intended or reasonably expected to be used with a Tobacco Product, whether or not sold separately. "Tobacco Product" does not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where such product is marketed and sold solely for such an approved purpose.
- (h) "Tobacco Retailer" means any store, stand, booth, concession or any other enterprise that engages in the retail sale of Tobacco Products, including but not limited to stores that engage in the retail sale of food items.

5.75.040 Prohibition Against Sale or Offer for Sale of Flavored Tobacco Products.

- (a) The sale or offer for sale, by any person or Tobacco Retailer of any Flavored Tobacco Product is prohibited and no person or Tobacco Retailer shall sell, or offer for sale, any Flavored Tobacco Product.
- (b) There shall be a rebuttable presumption that a Tobacco Product is a Flavored Tobacco Product if a Manufacturer or any of the Manufacturer's agents or employees, in the course of their agency or employment, has made a statement or claim directed to consumers or to the public that the Tobacco Product has or produces a Characterizing Flavor including, but not limited to, text, color, and/or images on the product's Labeling or Packaging that are used to explicitly or implicitly communicate that the Tobacco Product has a Characterizing Flavor.

5.75.050 Penalties and Enforcement.

- (a) The Director of the Department of Health and Human Services, or his or her designee, may enforce this chapter by any remedy allowed under the Marin County Code, including but not limited to suspension or revocation of a Tobacco Retailer's license pursuant to Marin County Code Sections 5.70.056 and 5.70.057 and/or the imposition of administrative fines pursuant to Marin County Code Section 5.70.058. In addition to the grounds for revocation contained in Marin County Code Section 5.70.056, failure to comply with Section 5.75.040 shall be independent grounds for revocation.
- (b) This section shall not be interpreted to limit the applicable civil or administrative remedies available under law.

- (c) The Director of the Department of Health and Human Services or his or her designee may adopt administrative rules, regulations, or guidelines for the implementation and enforcement of this chapter.

5.75.060 Public Nuisance.

Any violation of this ordinance is hereby declared a public nuisance.

5.75.070 No Conflict with Federal or State Law.

Nothing in this chapter shall be interpreted or applied so as to create any requirement, power, or duty that is preempted by federal or state law.

5.75.080 Severability.

If any provision, section, subsection, sentence, clause, phrase, or word of this Chapter 5.75, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of the chapter. The Board of Supervisors hereby declares that it would have passed this chapter, and each provision, section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional without regard to whether any other portion of this chapter or application thereof would be subsequently declared invalid or unconstitutional.

SECTION II: Subsection (f) of Section 5.70.040 of Chapter 5.70 of this Ordinance Code, subsection (d) of Section 5.80.030 of Chapter 5.80 of this Ordinance Code, subsection (y) of Section 7.70.020 of Chapter 7.70 of this Ordinance Code, Section 22.02.694I of Chapter 22.02I of this Ordinance Code, and Section 22.130.030 of Chapter 22.130 of this Ordinance Code, are hereby amended to define "Tobacco Product" as follows:

- (1) Any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to, cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, and snuff.
- (2) Any electronic device that delivers nicotine or other substances to the person inhaling from the device, including, but not limited to, an electronic cigarette, electronic cigar, electronic pipe, or electronic hookah.
- (3) Notwithstanding any provision of subsections (1) and (2) to the contrary, "Tobacco Product" includes any component, part, or accessory intended or reasonably expected to be used with a Tobacco Product, whether or not sold separately. "Tobacco Product" does not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where such product is marketed and sold solely for such an approved purpose.

This Ordinance shall be in effect thirty (30) days after adoption. However, its provisions shall not become enforceable until July 1, 2019 for any person or Tobacco Retailer that is not a Tobacco Store, as defined in California Business and Professions Code Section 22962. For any Tobacco Store, as defined in California Business and Professions Code Section 22962, lawfully operating prior to June 1, 2018, this Ordinance shall become enforceable on January 1, 2020.

PASSED AND ADOPTED at a regular meeting of the Board of Supervisors of the County of Marin held on this 6th day of November 2018, by the following vote:

NOES: NONE
ABSENT: NONE

ATTEST:

CLERK